Supreme Court, U.S.
FILED
AUG 22 1990
JOSEPH F. SPANIOL, JR.
CLERK

91-108

IN THE SUPREME COURT OF THE

UNITED STATES

October Term, 1990

No._____

CHARLES DIPILLA, et. al., Petitioners,

vs.

AMSOUTH BANK N.A., et.al., Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BARRY A. BISSON, Esq.
17111 Beach Blvd. #201
Huntington Beach, CA 92647
(714) 848-0479
Attorney for Petitioners

QUESTIONS PRESENTED

Whether the Ninth Circuit violated Petitioners right to due process in granting respondents' motion to dismiss Petitioners' appeal for failure to prosecute the appeal, and whether the statues provide for such a motion to be made by appellees.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW 1

OPINIONS BELOW 2

JURISDICTION 3

QUESTIONS PRESENTED 3

CONSTITUTIONAL AND STATUATORY PROVISIONS 4

STATEMENT OF THE CASE 4

RULINGS BELOW 6

REASONS FOR GRANTING WRIT 7

CONCLUSION 8

APPENDIX A (Order-Summary Judgment)

APPENDIX B (Dismissal of Appeal)

APPENDIX C (Motion for Rehearing re: Dismissal of Appeal)

APPENDIX D (Order-Denial Rehearing)

TABLE OF AUTHORITIES

28 USCS 1254 (1) 3

Fifth Amendment,
U.S. Constitution 4

Rule 42-1, FRAP 4,7

Local Rule 4 4,7

TO THE HONORABLE THE CHIEF JUSTICE
AND ASSOCIATE JUSTICES OF THE
SUPREME COURT OF THE UNITED STATES:

Dr. and Mrs. Charles DiPilla, et al, the petitioners herein, pray that a writ of certiorari issue to review the judgment of the Ninth Circuit Court of Appeals (Case Number 88-6695) entered in this matter on May 24, 1990, denying a reversal of a dismissal for failure to prosecute which was entered April 2, 1990. The original appeal underlying petitioners' request for reversal of the dismissal was from a final grant of summary judgement issued by the District Court on October 31, 1988, with a notice of appeal filed on November 29, 1988.

OPINIONS BELOW

The opinion of the Ninth Circuit is not reported and is reprinted in Appendix B. The grant of summary judgment of the trial court is printed

in Appendix A hereto.

JURISDICTION

The judgment of the Ninth Circuit was entered on April 2, 1990 (Appendix B). A timely petition for rehearing was denied on May 24, 1990 (Appendix C). The jurisdiction of the Supreme Court is invoked pursuant to 28 USCS 1254(1).

QUESTIONS PRESENTED

Whether the Ninth Circuit violated Petitioners right to due process in granting respondents' motion to dismiss Petitioners' appeal for failure to prosecute the appeal, and whether the statues provide for such a motion to be made by appellees.

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves the Fifth Amendment to the Constitution of the United States of America which provides for due process of law, Ninth Circuit Rule 42-1, which provides for dismissal of an appeal for failure to prosecute and Local Rule 4 (Ninth Circuit) which provides the procedure for processing an appeal in this district.

STATEMENT OF THE CASE

The underlying civil case involves allegations of securities fraud, among other charges, in connection with the sale of a hotel in Alabama to a group of investors which included several major

NBA basketball players. Summary judgment was granted to Defendants AmSouth Bank on May 23, 1988, and to Defendants George Steinberg and Steinberg & Short on October 31, 1988.

Petitioners filed a notice of appeal on November 29, 1988. Pursuant to Local Rule 4, Appellants timely served a notice of designation of the transcript upon Appellees on December 7, 1988 (See Exhibit A of Petition for Rehearing, attached hereto under Appendix C).

The transcripts for the May 23, 1988, hearing on the motion for summary judgment were requested on July 13, 1988, and have been received (See Exhibit B of Petition for Rehearing, attached hereto under Appendix C).

Transcripts for the October 31, 1988 hearing were requested on December 12, 1988 and have not yet been received

(See Exhibit C of Petition for Rehearing, attached hereto under Appendix C).

A Civil Docketing Statement was filed on or about February 10, 1990, after an extension of time was granted by the Ninth Circuit (See Exhibits D&E of Petition for Rehearing, attached hereto under Appendix C).

THE RULINGS BELOW

Appellees George Steinberg and Steinberg & Short made a motion to dismiss the appeal for failure to prosecute. The Ninth Circuit had not noticed Appellants of any deficiencies in perfecting of the appeal. On April 2, 1990, the Ninth Circuit dismissed the appeal for failure to prosecute. On April 5, 1990, Appellants filed a motion for reconsideration of the dismissal, which was denied on May 24, 1990.

REASONS FOR GRANTING THE WRIT

Appellants believe they adhered to proper procedure to perfect a civil appeal as mandated by local rule 4 of the Ninth Circuit.

Ninth Circuit Rule 42-1 provides for dismissal by the Court for failure to prosecute. It does not provide for an Appellee to petition the Court for a dismissal when, in Appellee's opinion, the appeal has not been prosecuted.

Appellants did not file an opposition to Appellees' motion to dismiss because the deficiencies complained of were erroneous, as evidenced by the fact that Appellants had not been notified by the court of any deficiencies. Further, Rule 42-1 does not allow for such a motion by Appellees, and it should not have been

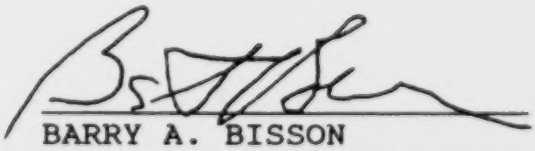
considered by the court.

If any deficiencies existed, Appellants should have been notified by the court and allowed to correct said deficiencies. To dismiss an appeal without said notice is a violation of Appellants right to due process.

CONCLUSION

Wherefore, Petitioners respectfully request that a writ of certiorari be granted.

DATED: September 28, 1990



BARRY A. BISSON
Attorney for Petitioners

APPENDIX A

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. CV 86-8374-HLH Date: Oct 31, 1988

Totle: CHARLES DIPILLA, et al V. HOTEL REDMONT, et al; CHARLES DIPILLA, et al V. GEORGE G. SHORT, et al.

DOCKET ENTRY

ENTERED CLERK
U S DISTRICT COURT
OCT 31, 1988
CENTRAL DISTRICT OF CALIFORNIA

PRESENT:

HON. HARRY L. HUPP, JUDGE
Robert Bolton, Deputy Clerk

ATTORNEYS PRESENT FOR THE PLAINTIFFS:

Barry A. Bisson

ATTORNEYS PRESENT FOR DEFENDANTS:

Roger A. S. Manlin
Paul I. Wapner

PROCEEDINGS: MOTION FOR SUMMARY JUDGEMENT BY DEFENDANTS GEORGE G. SHORT AND STEINBERG & SHORT

ORDER (also, if applicable, findings and memorandum opinion):

The motion for summary judgement is granted. Action #CV 87-7377 (previously consolidated with action #CV 858874) is severed and judgement for defendant Short and Steinberg & Short (to the extent that it is a defendant) is determined to be a final judgement terminating action #CV 85-7377 (there being no other active defendants) pursuant to Rule 54. Statement of Uncontradicted Facts and Conclusions of Law are adopted as modified and are to be construed with this minute order. Judgement signed and filed this date.

1. The claim based upon the mail and wire fraud statutes state no private cause of action (see minutes order on the AmSouth motion for summary judgement). 2. To the extent that the complaint is interpre ted to state claims under §§ 12(1) and 12(2)

of the Securities Act of 1933, the uncontradicted evidence is that moving defendants are neither sellers of the securities nor participate in the sale of same. (See, e. g., Pinter, (1988) 100 L.Ed 2d 658.) Thus, the fact that Short prepared a private placement memorandum which arguably had false information in it, or failure to disclose relavant information, is irrelevant (Short denies fault in this respect but a triable issue of fact would be present if the issue were relevant). Accordingly, the court does not reach the limitations problem (although it appears that at least the §12(1) limitations period is not equitably tolled; 3. Plaintiffs suggest that they have a malpractice claim. However, it is not pleaded (and the pre-trial conference order has not been signed so that it may not be relied on). In addition, it does not appear that plaintiffs are clients of defendant Short who might

assert such a claim. At least the first reason is fatal. 4. The RICO counts do not state and claim. There is no allegation of facts showing the enterprise and the pattern (no threat of ongoing activity alleged; RICO is not usable in one shot frauds). And even if the pleading deficiencies could be overcome, there are no facts set forth showing the elements of a RICO claim, not limited to those specified above. 5. Plaintiffs show no involvement of Steinberg & Short.

The lawsuit has no merit and it is time that it is ended.

APPENDIX B

Barry A. Bisson
17111 Beach Blvd, #201
Huntington Beach Ca 92647
(714) 848-0479
Attorney for Appellants

UNITED STATES COURT OF APPEALS

FOR THE NINTH DISTRICT

CHARLES DIPILLA, et al Plaintiffs-Appellants VS. AMSOUTH BANK N. A. et al Defendants-Appellees	CA No. 88-6695 DC# CV-37-7337-HLH MOTION FOR RECONSIDERATION OF DISMISSAL OF APPEAL FOR FAILURE TO PROSECUTE

Appellants in the above-encaptioned case hereby request a reconsideration of the dismissal of the appeal filed on November 29, 1988. The appeal was dismissed on April 2, 1990, by the Ninth Circuit (Judges Wallace, Sneed, and Leavy) for failure to prosecute.

This motion is made upon the following grounds:

1. Appellants believe they have adhered to proper Appellant procedure as mandated by the Ninth Circuit. No opening brief has been filed because no briefing schedule has been set, nor have the transcripts from the October 31, 1988, hearing been received by Appellants.

2. Ninth Circuit Rule 42-1 provides for dismissal by the court for failure to prosecute. It does not provide for Appellee to petition the Court for a dismissal when, in Appellee's opinion, the appeal was not prosecuted.

This motion is based upon the files and records of the case, upon the attached Memorandum of Points and Authorities, Exhibits, and the Declaration of Michele Monroe.

DATED: April 5, 1990

BARRY A. BISSON
Attorney for Appellants

MEMORANDUM OF POINTS AND AUTHORITIES

Local Rule 4 specifies the procedure to be followed to prepare the record on appeal. As can be seen by the attached Exhibits A & B, Appellants filed a Notice of Designation of Transcript and the Designation of Transcript for the hearing of October 31, 1988. The reporter's copy of the Designation of Transcript was sent to the attention of Leonard Brosman, coordinator for the court reporters. To date, Appellants have not received a copy of the transcript for the hearing.

Appellants had also filed a designation of transcript for the hearing held on May 23, 1988 (Exhibit C, attached hereto), and received a reporter's transcript in a timely manner.

Appellants later filed a Motion for Extension of Time to file the Civil Docketing Statement (Exhibit D, attached

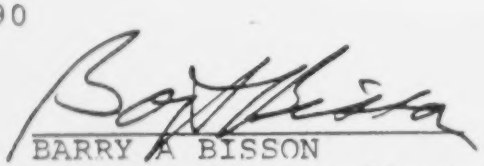
hereto) and simultaneously filed the Civil Appeals Docketing Statement (Exhibit E, attached hereto).

Counsel for the Appellants believes that proper procedure has been followed for perfecting an appeal, and has successfully followed this procedure in other federal civil appeals. When the motion to dismiss was received, a call was placed to Appellee Amsouth's counsel to inform him that his motion was ill-founded (see Declaration of Michele Monroe as attached hereto).

Further, Counsel for the Appellants cannot find any rule which allows for a motion to dismiss for failure to prosecute by the Appellee in a civil action. If there were a problem with Appellants' perfection of the appeal, then the Court would normally notify Counsel of any deficiencies. No such notice has been given by the Court.

Appellants respectfully request that the dismissal of the instant appeal be vacated, and the briefing schedule be set. Appellants are willing to proceed without benefit of the transcripts from the October 31, 1988, hearing, if they cannot be procured.

DATED: April 5, 1990



BARRY A BISSON
Counsel for Appellants

DECLARATION OF MICHELE MONROE

I, Michele Monroe, declare as follows:

1. I am an independent paralegal employed by Barry A. Bisson to work on specific projects.

2. The appeal of Dipilla, et al, v. Amsouth, et al, is one of my projects.

3. I completed and mailed the required documents necessary to complete the record on appeal and initiate the briefing schedule (see Exhibits A, B, C, D, and E, attached hereto).

4. On or about June of 1989, I contacted the office of Pat Lawler, who was then acting as the coordinator for the court reporters, to ask her about the transcripts which I had ordered from Evaline Lejito on December 12, 1988. Ms. Lawler was not available, but I left a message pertaining to the transcripts.

5. I recall seeing a motion to dismiss by Amsouth Bank sometime in October, 1989,

although I cannot find this motion in the case files.

6. Upon reviewing the motion, I checked Mr. Bisson's files and found that I had followed the normal procedure for an appeal. I did notice that the files were missing conformed copies of the Notice of Designation and the Motion for Extension of Time.

7. Mr. Bisson and I discussed the motion, and he suggested that I call the Ninth Circuit to make sure that all documents were on file.

8. I called the Ninth Circuit and asked one of the clerks if our file was missing the documents which are attached to this declaration as Exhibit A - E. I was informed that everything seemed to be in order, but that a certificate of record had not been filed.

9. I informed Mr. Bisson that the Ninth Circuit saw no deficiencies in the

Dipilla case. I informed him that I was in the middle of several other cases and would be hardpressed to respond to the motion.

10. I also indicated that my research into the rules of Appellate Procedure didn't turn up any precedent for an Appellee requesting a dismissal for failure to prosecute, although Local Rule 6(d) does allow for such a motion in criminal appeals.

11. Mr. Bisson felt that, as soon as the record was certified, he would receive a briefing schedule which would make the motion for dismissal boot. He indicated that he would contact counsel for Amsouth to see if they would voluntarily dismiss the action in light of their erroneous allegations that the appeal has not been prosecuted.

I declare, under penalty of perjury, that the foregoing is true and correct.

Executed this 6th day of April, 1990, at Huntington Beach, California.

Michele Monroe

Barry A Bisson
Attorney at Law
17111 Beach Blvd, Suite 201
Huntington Beach Ca 92647

Bar No. 79591

(714) 848 0479

Attorney for
Plaintiffs/Appellants

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CHARLES DIPILLA, ET AL) Plaintiffs) v.) HOTEL REDMONT, ET AL,) Defendants)	CV 87-7377-HLH NOTICE OF APPEAL
CHARLES DIPILLA and CHRISTINE DIPILLA, STANLEY LAVINE and JEAN LAVINE, WESTON RICHTER, HENRY KAWAMOTO, JR., AND KATHLEEN KAWAMOTO, ARTHUR ROSENBAUM, RONALD STEIN, Plaintiffs/Appellants)	88-6695

v.

AMSOUTH BANK N. A., a national banking association, STEINBERG and SHORT, and GEORGE C. SHORT,

Defendants/Appellees

PLEASE TAKE NOTICE, that the above-captioned Plaintiffs in cases . . . CV 87-7377, hereby appeal to the United States Court of Appeals for the Ninth Circuit from a final order for summary judgement in favor of Amsouth Bank, N. A., and STEINBERG AND SHORT and GEORGE G. SHORT

The order for summary judgement as to Amsouth Bank was entered on May 24, 1988, but was not a final order, as there were other defendants remaining in the action. The order for summary judgement as to George G. Short and Steinberg and Short was filed on October 31, 1988, and was a final judgement which terminated the action designated as CV 87-7377.

The names and addresses of all interested parties are listed on the attached sheet.

DATED: November 28, 1988

Barry A Bisson

Attorney for Plaintiffs

NOTE: Any exhibits which were attached to the preceding document designated in Appendix A were not included as part of said Appendix, but may be found in the record as designated.

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

F I L E D

APR -2 1990
CATHY CATTERSON, CLERK
U. S. COURT OF APPEALS

CHARLES DIPILLA, et al,	No. 88-6695
Plaintiffs-Appellants	DC# CV-87-7337-HLH
	Central California
vs.	
	ORDER
AMSOUTH BANK N. A.et al	
Defendants-Appellees.	

Before: WALLACE, SNEED and LEAVY,
Circuit Judges

The unopposed motion to dismiss for failure to prosecute is granted. See 9th Cir. r. 42-1.

APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

F I L E D

MAY 24 1990
CATHY A. CATTERSON, CLERK
U. S. COURT OF APPEALS

CHARLES DIPILLA, et al	No. 88-6695
Plaintiffs-Appellants,	
	DC# CV-87-7377-HLH
vs.	Central California
AMSOUTH BANK N. A.et al	
	ORDER
Defendants-Appellees	

Before: WALLACE, SNEED and LEAVY,
Circuit Judges

Appellants' motion for reconsideration of the order dismissing the appeal is denied.

AFFIDAVIT OF SERVICE BY MAIL

I do hereby declare that I am a citizen of the United States, employed in the County of Orange, I am over eighteen (18) years of age, and that my business address is 17111 Beach Blvd, #200, Huntington Beach Ca 92647. I am not a party to the within action; and on the 1st day of October, 1990 at Huntington Beach, California, I deposited in the United States mail three true copies of: PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

in an envelope addressed to the following:

Gregory A. Long, Mark V. Livingston
Sheppard, Mullin, Richter & Hampton
333 S. Hope St, 48th Floor
Los Angeles Ca 90071

Barton, Klugman & Oetting
333 S. Grand Ave, Floor 37
Los Angeles Ca 90071

after carefully sealing said envelope so containing said copies and affixing thereon the postage required by law.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed at Huntington Beach, California, this 1st day of October, 1990.

Michele Monroe

TO: Joseph Spaniol, Jr.,
Clerk of the Court

and

Francis J. Lorson
Chief Deputy Clerk

RE: Tardiness of Revised Brief

On October 12, 1990, Mr. Bisson's office was notified of a deficiency in the Petition for a Writ of Certiorari. I am an independent contractor who was hired by Mr. Bisson to work on this case.

For over a month, I made inquiries with other attorneys who were familiar with Supreme Court procedure, but felt that the answers which I was given would not remedy the deficiency at hand. I then called the Supreme Court and attempted to speak with someone who could give me direction. I left several messages with various clerks, but, undoubtedly due to the holiday season, received no response.

Finally, on January 29, 1991, I spoke with Mr. Francis Lorson, who graciously gave me the information which I needed. I informed Mr. Lorson that Mr. Bisson did not intend to abandon the case and asked that the petition be reinstated. Mr. Lorson informed me that Mr. Bisson should submit the revised Petitions, along with a check for $300.00 to reinstate the Petition.

Since January 29th, I have been unable to complete the revision due to a death in the family and an extended bout with the flu. Mr. Bisson was forced to rely upon me to complete the project because all the work had been entered in my computer, to which no one but myself has access.

Mr. Bisson has been very patient with me, and I offer my apologies to this Court and to all concerned for the tardiness of the revised Petition.

Sincerely,

Michele Monroe MAY 28, 1991

MICHELE MONROE

FILED
AUG 19 1991
OFFICE OF THE CLERK

(2)

No. 91-108

In The

Supreme Court of the United States

October Term, 1991

CHARLES DIPILLA, et al.,

Petitioners,

vs.

AMSOUTH BANK N.A., et al.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether the Ninth Circuit Court of Appeal abused its discretion by dismissing Petitioner's appeal for lack of prosecution.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

STATEMENT OF THE CASE..... 1

REASONS FOR DENYING THE WRIT 2

CONCLUSION 3

TABLE OF AUTHORITIES

Page

Circuit Rule 10-3.1 2

Circuit Rule 42-1 2

No. 91-108

In The

Supreme Court of the United States

October Term, 1991

CHARLES DIPILLA, et al.,

Petitioners,

vs.

AMSOUTH BANK N.A., et al.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

On May 24, 1988 summary judgment was entered in this action in favor of Respondent, Amsouth Bank and against Petitioners. On October 31, 1988, Respondents, George G. Short and Steinberg & Short moved for summary judgment. The Honorable Harry L. Hupp granted the motion and a judgment was filed and entered on October 31, 1988. Thereafter, on November 29, 1988 Petitioners filed a notice of appeal.

On March 2, 1989 the Ninth Circuit Court of Appeals issued an order directing that the parties immediately comply with Circuit Rule 10-3.1. The order specifically stated that:

> "If appellant fails to designate the reporter's transcript or to file a timely brief or a timely motion for extension of time the appeal will be dismissed by the clerk under Ninth Circuit Rule 42-1."

Subsequently, on or about October 13, 1989 Respondent, Amsouth Bank brought a motion to dismiss the appeal on the basis that Petitioners had failed to prosecute it. Amsouth Bank pointed out in its motion that Petitioners had failed to request or designate a reporter's transcript. Petitioners did not oppose the motion to dismiss and an order was issued on April 2, 1990 dismissing the appeal. On May 24, 1990 a motion for reconsideration of the dismissal was denied.

REASONS FOR DENYING THE WRIT

It is clear that Petitioners' appeal to the Ninth Circuit was properly dismissed for failure to prosecute. Petitioners failed to comply with the Federal Rules of Appellate Procedure by filing any document requesting or designating a reporter's transcript. Respondents, George Short and Steinberg & Short were not served with a request to designate a reporter's transcript. In addition, Petitioners have not been able to produce any conformed copy of such a request, indicating that it was ever filed. Furthermore, Respondent, Amsouth Bank, represented in its motion to dismiss the appeal that a review of the

District Court file revealed that the request for designation of reporter's transcript was not filed.

Moreover, Petitioners failed to file any opposition to Amsouth Bank's motion to dismiss for failure to prosecute. They can hardly claim that they have been denied due process when they themselves chose not to assert their rights by filing an opposition.

CONCLUSION

For all of the foregoing reasons, along with those stated in the Respondents' brief of Amsouth Bank which are hereby incorporated by reference, Respondents George Short and Steinberg & Short submit that the petition for Writ of Certiorari should be denied.

Dated: August 19, 1991

Respectfully submitted,

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